No. 83-981

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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STANLEY SPENCER, DAVID DALEY,
STEPHEN ODYSSEUS, JR.,
J. FORSTER BETTS, KENT JAFFA,
DARRELL TURPIN, RAFE BLACK, GARY BOWLES,
GORDON BOWN, AND I. CLEOO WRIGHT,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES CITED

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---

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STEPHEN ODYSSEUS, JR.,
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In opposing this Court's issuance of a writ of certiorari and insisting that the court of appeals decision below was correct in adopting the "litigation position" theory of examination, Respondent relies primarily on two arguments. First, they suggest that in certain instances the government's litigation position may be based on defenses totally unrelated to the underlying merits of the case. In such circumstances, if a court were to examine both pre-litigation and litigation conduct the government would be deterred from asserting those defenses, which, in turn, would effectively result in an automatic award to the prevailing party — a result not intended by Congress.

Second, Respondent disputes the existence of any circuit court conflict over the question at issue herein. They do not believe that the Third Circuit decision in *NRDC v. EPA* 703 F.2d 700 (3rd Cir. 1983), which required both pre-litigation and litigation conduct to be scrutinized, was sufficiently definitive on the issue so as to create an inter-circuit conflict. As demonstrated below, both arguments are untenable.

## I. REQUIRING THE GOVERNMENT TO JUSTIFY BOTH ITS UNDERLYING ACTION AND LITIGATION POSITION WILL NOT RESULT IN AN AUTOMATIC ASSESSMENT OF A FEE AWARD AGAINST THE GOVERNMENT

Respondent places great weight on the third of five hypothetical examples set out by the court of appeals to conclude that the EAJA would best be served by focusing only on the government's litigation position. (Resp. Br. at 11).

In this example, the government defends a challenge to an agency action on the basis of defenses unrelated to the merits of the underlying action, such as laches, statute of limitations, or, as here, mootness and lack of jurisdiction. In the view of the D.C. Circuit, if the "substantial justification" inquiry were to focus on the underlying agency action, then government counsel might be reluctant to assert plausible defenses of the above character. That reluctance would stem from counsel's recognition that "if he did not prevail, the

government would automatically be liable, not only for the value of the claim, but also for the plaintiff's attorneys' fees." *Spencer v. NLRB* 712 F.2d 539, 554 (D.C. Cir. 1983) (32c). Such a result, in the D.C. Circuit's view, would be both "unfortunate, from a policy standpoint" and "inconsistent with Congress' desire not to chill legitimate efforts by the executive to enforce the law." *Id.* at 555, (32c).

Although a desire not to inhibit legitimate efforts by the executive to enforce the law was clearly an important consideration of Congress when enacting the EAJA, it was also clearly a secondary consideration. The D.C. Circuit itself recognizes as much. It characterizes the "reduction of the deterrents to challenge unreasonable government conduct" as the *central objective* of the EAJA. *Spencer* 712 F.2d at 560, (43c). Elsewhere it describes that same objective as the *central purpose* of the Act. *Id.* at 563, (51c). The premise of the above example is that the underlying agency action represents "unreasonable government conduct," although there may be a plausible defense unrelated to the merits of that conduct. How the Act's central objective is to be served by permitting the government to escape *any* liability for fees when it defends unreasonable agency conduct on the basis of an unrelated defense is impossible to fathom. This is particularly so when the alternative is not, as the D.C. Circuit and Respondent assert, automatic liability for all of Petitioners' attorney fees.

In the specific hypothetical example offered by the D.C. Circuit, the plaintiff has delayed filing his suit until the case is "moderately stale" and the government is able to collect only "scant evidence" to dispute his claims. *Spencer* 712 F.2d at 554, (32c). The government attorney, in the view of the D.C. Circuit, might forego asserting a plausible laches defense if the "underlying action" test were to govern the award of fees. This is because failure of that defense would allegedly make the government "automatically" liable for all of plaintiff's attorney fees. *Id.*

In so asserting, the D.C. Circuit overlooks the fact that § 2412(d)(1)(A) allows a court not to award fees if it finds that "special circumstances make an award unjust."[1] The court's

[1]Elsewhere in its opinion the D.C. Circuit acknowledges that this provision serves as a "safety valve" in "unusual circumstances in which neither the purposes of the Act nor considerations of equity would be promoted by awarding fees." *Id.* at 559 n.72 (41c).

hypothetical example may also fit within § 2412(d)(1)(C), which authorizes courts to reduce or deny awards "to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." Although this provision appears aimed at post-complaint conduct, it may also be available against plaintiffs whose delay in filing a complaint unreasonably protracts final resolution of the controversy. In any event, it is clear that the government's liability for the full amount of Petitioners' attorney fees is hardly automatic.

Applying this rationale to the facts of this case, utilizing the underlying and litigation position theory would allow a court to withhold granting fees to that portion of the government's position which it finds substantially justified. Finding the government's mootness and jurisdictional defense justified in this case would preclude Petitioners from collecting an award only for work performed from the time of filing the complaint. However, the court would not be prohibited from examining the government's conduct which took place before the complaint was filed and awarding fees if that position was not substantially justified.

This approach is precisely what Judge Thompson envisioned in her concurring opinion in *NRDC*. Addressing the government's fear of an automatic award being assessed if its underlying conduct was examined, she stated "[i]f by taking corrective action, the government ameliorates the improprieties of its conduct after suit is filed, there would be no valid reason to award attorneys' fees against the government for defending a litigation position *after that position has become substantially justified*." *NRDC* 703 F.2d at 716. (emphasis added). *Accord: Goldhaber v. Foley* 698 F.2d 193, 197 (3rd Cir. 1983) ("The only solution consonant with the legislative intent as we discern it, is to charge the United States with that portion of the expenses attributable to its unjustified position.")

It is plain, therefore, that the court of appeals' reasoning, based on its third hypothetical example, offers Respondent little justification for its argument that its litigation position alone should be the governing standard for an award of attorneys' fees.

## II. CONTRARY TO RESPONDENT'S SUGGESTION THE THIRD AND NINTH CIRCUITS HAVE CLEARLY ADOPTED THE UNDERLYING AND LITIGATION POSITION THEORY

Respondent artfully suggests that no opinion concerning the proper interpretation of "position" was ever rendered by the Third Circuit in *NRDC*. (Resp. Br. at 15-16). This is evidenced by the fact, according to Respondent, that Judge Thompson only concurred with the decision to award fees but did not endorse Judge Gibbons' definition of "position of the United States".

This is a clear misrepresentation of the Third Circuit's holding. Judge Thompson was in total agreement with the opinion of Judge Gibbons with respect to the coverage that "position of the United States" should be given. Judge Gibbons stated repeatedly that the term refers to "proceedings in the agency *as well* as in Court." *NRDC* 703 F.2d at 712. *See also, id.* at 707, 708 ("Congress intended that the statute provide an incentive for suits to control agency actions, not merely to make Justice Department litigators behave"); (" 'position of the United States' must have been meant to include not only the litigation position . . . but also the agency position which made the lawsuit necessary").

In her concurrence, Judge Thompson specifically "concurr[ed] with the opinion of Judge Gibbons to the extent that it concludes that the reference to the 'position of the United States' . . . *includes* the agency action which prompted the aggrieved party to challenge governmental action." *Id.*, at 714. (emphasis added). Both Judges agreed that pre-litigation and litigation positions should be considered. Instead, Respondent incorrectly assigned to Judge Gibbons the view that he would focus exclusively on pre-litigation conduct while Judge Thompson would focus on both the pre-complaint and litigation stages.

The only disagreement between the Judges centered on the degree of assistance EAJA's legislative history could provide in shedding light on the meaning of "position of the United States." Judge Gibbons felt that the legislative history was quite clear in requiring the government's litigation position and underlying action

to be substantially justified. Judge Thompson, on the other hand, did not find the legislative history so clear on that point. Properly understood, her concurrence was an instruction to other courts passing on the question that the legislative history was too ambiguous and should not be relied on as authoritative to conclude that "position of the United States" referred to conduct occurring before and after a complaint is filed.

Just recently, the Ninth Circuit in *Rawlings v. Heckler* No. 82-4545 (9th Cir. Feb. 13, 1984) adopted the Third Circuit's interpretation of the meaning of "position of the United States." In no uncertain terms, the court stated that the " 'uncertainty' of the legislative history supports the view that Congress intended to include both the underlying action and the government's litigation posture within the term position." (slip op. 7).

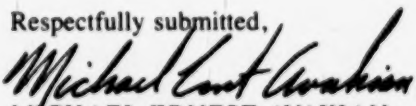
Incredibly, Respondent reads the *Rawlings* decision as supportive of their interpretation of "position" and consistent with the court of appeals decision below. Examining the government's position in *Rawlings*, the court noted that it took the Social Security Administration a year to settle the suit. This language, says Respondent, evidences the fact that the government's litigation position was all the court required to be substantially justified.

Respondent completely distorts the *Rawlings* decision by quoting out of context one sentence which referred to the government's litigation position. *Rawlings* stated that "the remedial purpose of EAJA is best served by considering the totality of the circumstances prelitigation and during trial." (slip op. 7-8). The court then proceeded to do exactly that — it looked at the government's prelitigation and litigation position and specifically stated that *both* positions were substantially unjustified. The court in no way limited its focus only on the government's litigation position as suggested by Respondent.

## III. CONCLUSION

The inevitability of recurring litigation over this issue which Petitioners predicted in their petition has been realized and will continue unless and until this Court resolves the dispute. For this reason and those stated in their petition, Petitioners respectfully request that the Writ of Certiorari be granted.[2]

Respectfully submitted,



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March 26, 1984

[2] Respondent notes that Congress is actively considering legislation that would define "position of the United States" consistent with the interpretation advocated by Petitioners. It is not certain, however, that Congress will ultimately rule on the matter. Therefore, it would be entirely proper for this Court to grant certiorari and postpone scheduling oral argument pending Congressional action. Should Congress not resolve the issue, this Court could then decide the question. Alternatively, if Congress does clarify the issue, this Court could remand the case to the court of appeals.